(1) Supreme Court, U.S.
FILED

Docket Number 031061 SEP 17 2003

OFFICE OF THE CLERK

Supreme Court of the United States

Louise M. Blount

Petitioner

v.

Office of Personnel Management

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

Petition for Writ of Certiorari

Anthony J. Vetrano
Counsel of Record

Vetrano & Vetrano
Suite 118
216 Mall Boulevard
King of Prussia, PA 19406
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Question presented for review

Whether a petition for review that is filed one day late due to the admitted error of an express carrier is subject to equitable tolling where the statute specifying the time for review provides as follows:

> [A] petition to review a final order or final decision of the [Merit Systems Protection] Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

5 U.S.C.A. § 7703(b)(1).

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Citations of decisions below:

The decision of the Merit Systems Protection Board (on September 13, 2002) is unpublished.

The May 1, 2003 order by the Federal Circuit Court of Appeals (hereinafter called the "Federal Circuit") can be found at 64 Fed.Appx. 229, 2003 WL 21212579.

The Federal Circuit's June 19, 2003 order is unpublished.

Statement of the basis of the Court's jurisdiction

Date of the order sought to be reviewed:

June 19, 2003

Date of the order respecting rehearing:

On June 19, 2003 the Federal Circuit denied reconsideration of its May 1, 2003 order, which order had dismissed petitioner's petition for review as untimely (because the petition arrived one day late).

The Federal Circuit treated the motion for reconsideration as a petition for panel rehearing.

Statutory provision believed to confer jurisdiction to review the order in question:

28 U.S.C.A. § 1254(1).

The statute involved in this case:

> [A] petition to review a final order or final decision of the [Merit Systems Protection] Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

5 U.S.C.A. § 7703(b)(1).

Statement of the case

Petitioner's husband was a federal government employee.

When husband retired, he designated petitioner as his survivor annuitant. In other words, if husband died, petitioner would receive part of husband's retirement benefits—in the form of an annuity.

After husband retired, husband and petitioner divorced. Their divorce decree provides that husband's pension would "remain as is with any beneficiary entitlements to remain in petitioner's (wife's) name":

> Wife [petitioner] acknowledges and Husband represents that he was an employee of the U.S. Government who retired 3/31/84 and that he receives a pension from the Federal Government, some portion of which is marital property. The parties hereby agree that the pension shall remain as is with any beneficiary entitlements to remain in Wifes [sic] name.

Later, husband died, and petitioner submitted the divorce decree (a court order) to the United States Office of Personnel Management (OPM) in order to begin receiving the survivor annuity.

OPM decided the order (decree) did not entitle petitioner to a survivor annuity because, according to OPM, the order was not sufficiently expressive about the survivor annuity.

The Merit Systems Protection Board affirmed OPM's decision, and petitioner sought review in the Federal Circuit.

The basis for the Federal Circuit's jurisdiction is the statute cited above, 5 U.S.C.A. § 7703(b)(1).

Petitioner's petition for review to the Federal Circuit arrived one day late due to the admitted error of the express carrier that filed the petition. The express carrier's letter admitting such error is the last document in the appendix.

Basis for federal jurisdiction in the court of first instance:

5 U.S.C.A. § 7703(b)(1).

Argument amplifying the reasons relied on for allowance of the writ

The Federal Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court, and that conflicts with an en banc decision of the Federal Circuit itself.

Specifically, the panel decided that because the statute of review in this case is jurisdictional, the doctrine of equitable tolling does not apply.

Such decision is incorrect for three reasons.

First, the Supreme Court has held that the presumption of equitable tolling applies to suits against the United States, Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990), and the respondent, OPM, is an agency of the United States.

Second, the statute of review in this case has none of the characteristics that led the Supreme Court to conclude (with respect to another statute of review) that equitable tolling did *not* apply. United States v. Brockamp, 519 U.S. 347, 350-353 (1997).

Such characteristics were:

- The statute was detailed;

- The statute contained technical language;

- The statute reiterated its limitations several times in several different ways;

- The statute provided its own exceptions; and

- To have read an equitable tolling exception into the statute would have created serious administrative problems.

In contradistinction, the statute of review in this case has none of such characteristics. The statute, 5 U.S.C.A. 7703(b)(1), provides:

> [A] petition to review a final order or final decision of the [Merit Systems Protection] Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

It is apparent that such statute:

- Is not detailed;

- Does not contain technical language;

- Does not reiterate its limitations several times in several different ways;

- Does not provide its own exceptions; and

- Because the statute addresses appeal from a closed record, it does not threaten administrative complexity.

The third and last reason is that the panel decision is directly contrary to an en banc decision of the Federal Circuit itself, Bailey v. West, 160 F.3d 1360, 1366-1367 (Fed. Cir. 1998), wherein the court held that statutes specifying the time for review are

within the rebuttable presumption in favor of equitable tolling, even if the statutes are jurisdictional.

The petition for review to the Federal Circuit should have been subject to equitable tolling; in that way, the petitioner could have her "day in court."

The appendix

The appendix contains:

- OPM's decision, upon reconsideration, denying a survivor annuity to petitioner (such decision is dated April 16, 2002);

- The Merit Systems Protection Board's decision affirming OPM (such decision is dated September 13, 2002);

- The Federal Circuit's order of May 1, 2003 dismissing the petition for review as untimely;

- The Federal Circuit's order of June 19, 2003 concerning petitioner's motion for reconsideration; and

- The express carrier's letter admitting the error in delivery of the petition for review (the letter is dated January 17, 2003).

Respectfully submitted,

Anthony J. Vetrano
Counsel of Record

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Suite 118
216 Mall Boulevard
King of Prussia, PA 19406
610-265-4441

APPENDIX

United States

Office of Personnel Management

Washington, DC 20415-0001

April 16, 2002

CSF 2 490 242
Lucius A. Blount

Mary L. Blount
3710 Excalibur Court
101
Bowie, MD 20716

Dear Mrs. Blount:

This is in reply to your request for reconsideration of the initial decision of the Office of Personnel Management (OPM) denying you a former spouse survivor annuity. For the reasons stated below, we affirm the initial decision. Mr. Anthony J. Vetrano, your attorney wrote to us on your behalf.

BACKGROUND

On September 12, 1995, you and Mr. Blount were divorced. You applied for a former spouse annuity. OPM denied your request because your divorce decree did not award you a survivor annuity under the Civil Service Retirement System (CSRS), nor did it direct Mr. Blount to elect for you a survivor annuity under CSRS. Your request for reconsideration is denied.

ANALYSIS AND FINDINGS

OPM is charged with the administration of the Civil Service Retirement Law and is expected to pay benefits as provided by law. Also, we are obligated under law and regulation to correct any error(s) in payment of benefits. The laws and regulations that apply in your case are:

Section 8341 (h)(1) of title 5, United Stated Code, which provides in pertinent part:

> (h)(1) Subject to paragraphs (2) through (3) of this subsection, a former spouse of a deceased... annuitant... is entitled to a survivor annuity under this subsection, if an to the extent expressly provided for... in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree.

Section 838.804 of Title 5 of the Code of Federal Regulations, provides in pertinent part:

> (b) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it expressly awards a former spouse survivor annuity or expressly

directs an employee or retiree to elect to provide a former spouse survivor annuity as described in paragraph (b) of this section.

(a) To expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity as required by paragraph (a) of this section the court order must-

(1) Identify the retirement system using terms that are sufficient to Identify the retirement system as explained in §838.911; and

(2) (i) Expressly state that the former spouse is entitled to a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in §838.912; or

(ii) Expressly direct the retiree to elect to provide a former spouse survivor annuity using

terms that are sufficient to identify the survivor annuity as explained in §838.912. [Emphasis Added]

After a careful review of our records and in accordance with the above cite, we found that you were not awarded a former spouse survivor annuity under the CSRS. Therefore, we are unable to grant you the relief you sought.

APPEAL RIGHTS

This affirms and constitutes the final decision of OPM. You have the right to appeal to the Merit Systems Protection Board (MSPB) and will be notified if files an appeal. We are enclosing a package that contains 1) MSPB regulations, 2) MSPB office locations, and 3) an MSPB application form providing filing instructions. An appeal must be filed within 30 calendar days after the

date of this decision, or 30 days after receipt of this decision, whichever is later.

Sincerely,

Elizabeth Roberts, Benefits Specialist
Disability, Reconsideration and Appeals Division

Enclosures

cc: Mr. Anthony J. Vetrano, Attorney

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER DC-0831-02-0499-I-1

DATE: September 13, 2002

M. LOUISE BLOUNT

Appellant

v.

OFFICE OF PERSONNEL MANAGEMENT

Agency

(CSF 2 490 242).

Anthony J. Vetrano, Esquire, Vetrano & Vetrano, King of Prussia, Pennsylvania, for the appellant.

John Zimmerman, Washington, D.C., for the agency.

BEFORE

Edward F. Manning
Administrative Judge

date of this decision, or 30 days after receipt of this decision, whichever is later.

Sincerely,

Elizabeth Roberts, Benefits Specialist
Disability, Reconsideration and Appeals Division

Enclosures

cc: Mr. Anthony J. Vetrano, Attorney

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER DC-0831-02-0499-I-1

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M. LOUISE BLOUNT

Appellant

v.

OFFICE OF PERSONNEL MANAGEMENT

Agency

(CSF 2 490 242)

Anthony J. Vetrano, Esquire, Vetrano & Vetrano, King of Prussia, Pennsylvania, for the appellant.

John Zimmerman, Washington, D.C., for the agency.

BEFORE

Edward F. Manning
Administrative Judge

INITIAL DECISION

The appellant filed a timely appeal, within the Board's jurisdiction, from an Office of Personnel Management (OPM) April 16, 2002 reconsideration decision that found she was not entitled to a former spouse survivor annuity under the Civil Service Retirement System (CSRS). Appeal File (AF), Tab 1. For the following reasons, the agency's reconsideration decision is AFFIRMED.

BACKGROUND

Lucius A. Blount, the retiree/annuitant in this appeal, retired from Federal service on March 31, 1984, and elected an annuity with a reduction for survivor annuity coverage for the appellant, who was then his spouse. AF, Tab 5, Subtab 6. They subsequently separated on September 1, 1992, and were divorced on September 12, 1995, as recorded in a Decree (No. 94-

09329) in the Court of Common Pleas of Montgomery County, Pennsylvania. *Id.* The divorce decree incorporated a copy of a March 30, 1995 property settlement which provided, inter alia, for the following:

> (c) HUSBAND'S PENSION. Wife acknowledges and Husband represents that he was an employee of the U.S. Government who retired March 31, 1984,[1] and that he receives a pension from the Federal Government, some portion of which is marital property. The parties hereby agree that the pension shall remain as is with any beneficiary entitlements to remain in Wifes name.

AF, Tab 5, Subtab 6.

The appellant was the plaintiff in that action, and retiree/annuitant Lucius A. Blount the defendant. *Id.*

The OPM September 12, 2001 initial decision in this case stated that, based on its review of the language of the appellant's divorce decree (property settlement), it had determined that it did not expressly award her a former spouse survivor annuity. *Id.* at Subtab 4. In particular, OPM noted that the decree did not satisfy the requirements of 5 C.F.R. § 838.804(b)(2)(I), which states, in part, that to expressly award a former spouse survivor annuity a court order must:

> Expressly state that the former spouse is entitled to a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912;

5 C.F.R. § 838.804(b)(2)(I).

Because the appellant's court order did not satisfy the requirements stated in the cited regulation,

OPM found that it could not grant the appellant a former spouse survivor annuity. AF, Tab 5, Subtab 4.

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[1] Corrected by the parties by hand to read "3/31/84." AF, Tab 5, Subtab 6. Before correction the typed text read "7/7/94." *Id.*

The appellant requested reconsideration on October 5, 2001, asserting that 5 C.F.R. § 838.912, referenced in the OPM initial decision, provides that language indicating the former spouse is to "continue as" the beneficiary of CSRS survivor benefits is sufficient to satisfy the regulatory requirement found at § 838.804(b)(2)(I). AF, Tab 5, Subtab 3. Specifically, the regulation states:

> (b)(1) A court order that provides that the former spouse is to "continue as" or "be named as" the

> beneficiary of CSRS survivor benefits or similar language satisfies the requirements of 838.804(b)(2).

5 C.F.R. § 838.912(b)(1) (emphasis added by appellant).

Because the appellant's court order provided that "any beneficiary entitlements to remain in the Wifes name," she argued that such language was "similar" to the regulatory language, cited above, providing that a court order that contained wording that a former spouse "continue as" the beneficiary of CSRS survivor benefits would satisfy the regulatory requirement found at § 838.804(b)(2). AF, Tab 5, Subtab 3.

In its April 16, 2002 reconsideration decision, OPM stated that it had considered the appellant's argument, but had determined that her divorce decree

did not award her a survivor annuity under the CSRS, nor did it direct the retiree/annuitant, Lucius A. Blount, to elect a survivor annuity for her under the CSRS. AF, Tab 5, Subtab 2. Specifically, the agency reconsideration decision quoted 5 U.S.C. § 8341(h)(1), noting that it provides, in pertinent part, that:

> (h)(1) Subject to paragraphs (2) through (5) of this subsection, a former spouse of a deceased...annuitant...is entitled to a survivor annuity under this subsection, if and to the extent expressly provided for...in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree.

5 U.S.C. § 8341(h)(1).

The reconsideration decision continued, noting

that 5 C.F.R. § 838.804 of Title 5 of the Code of Federal Regulations, provides in pertinent part:

> (a) A court order awarding a former spouse survivor annuity is not a court order acceptable for processing unless it expressly awards a former spouse survivor annuity or expressly directs an employee or retiree to elect to provide a former spouse survivor annuity as described in paragraph (b) of this section.
>
> (b) To expressly award a former spouse survivor annuity or expressly direct an employee or retiree to elect to provide a former spouse survivor annuity as required by paragraph (a) of this section the court order must—
>
> (1) Identify the retirement system using terms

that are sufficient to identify the retirement system as explained in § 838.911; and

(2) (i) Expressly state that the former spouse is entitled to a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912; or

(ii) Expressly direct the retiree to elect to provide a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912.

5 C.F.R. § 838.804.

The agency stated in its reconsideration decision that after a careful review of its records, and in accordance with the above, it had determined, as initially stated, that the appellant was not awarded a

former spouse survivor annuity under the CSRS in her divorce decree. AF, Tab 5, Subtab 2. Consequently, it further informed her that it was unable to grant her the relief she sought. *Id.*

Neither party filed a prehearing submission. AF, Tab 13. The subsequent hearing was limited to argument on the evidence of record and the law cited by the parties as applicable to this appeal. Hearing Tape at AF, Tab 14.

ANALYSIS AND FINDINGS

The burden of proving entitlement to a survivor annuity is on the applicant for benefits. *See Cheeseman v. Office of Personnel Management,* 791 F.2d 138, 140-41 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 1037 (1987). The appellant must prove, by preponderant evidence, that she is entitled to the relief

she is seeking. 5 C.F.R. § 1201.56(a)(2); *See Bottrell v. Office of Personnel Management,* 36 M.S.P.R 338 (1988), *affd,* 867 F.2d 1421 (Fed. Cir. 1989).

During the hearing the appellant argued that, in addition to the regulations cited in her request for reconsideration, other provisions of 5 C.F.R. § 838.911 are also applicable to this appeal. HT 1. In particular, the following was cited:

> (a) To satisfy the requirements of § 838.804(b)(1), a court order must contain language identifying the retirement system affected. For example, ' 'CSRS," "FERS," "OPM," or "Federal Government" survivor benefits, or "survivor benefits payable based on service with the U.S. Department of Agriculture," etc., are sufficient identification of

the retirement system.

. . . .

(d) A court order that requires an employee or retiree to maintain survivor benefits covering the former spouse satisfies the requirements of § 838.804(b)(1), if the former spouse was covered by a CSRS or FERS survivor annuity or the FERS basic employee death benefit as defined in § 843.102 of this chapter at the time of the divorce.

5 C.F.R. § 838.911.

The agency argued during the hearing that the divorce decree (property settlement agreement) in this case did not identify the specific benefit provided the appellant, and most pointedly did not state that the appellant was being provided with a former spouse

survivor benefit. HT 1. Earlier, in its letter forwarding its response file to the Board, the agency noted that, given the statutory requirement for express language, the Board has consistently held that there is no entitlement to a former spouse survivor annuity when the divorce decree is silent or ambiguous on the subject, citing to *Nicholson v. Office of Personnel Management,* 64 M.S.P.R 340, 342 (1994), *Price v. Office of Personnel Management,* 52 M.S.P.R. 35, 37 (1991), and *Thomas v. Office of Personnel Management,* 46 M.S.P.R. 651, 653-54 (1991). AF, Tab 5.

Because the plain language of the statute in question requires "express language" awarding a survivor annuity, the agency argued that to find that such an award of a survivor annuity was inferred or implied by a court order, or similar document, would render the statutory language meaningless. *Id.*

The agency stated that although court orders that provide that the former spouse is to "continue as" or "be named as" designated beneficiary of CSRS benefits would be interpreted to award a former spouse annuity, 5 C.F.R. Part 838, Subpart J, App. B III.B.3 states that "[o]rders that provide that the former spouse will 'continue to receive benefits after the death of' the employee or 'that benefits will continue after the death of' the employee, but [that] do not use such terms 'survivor annuity,' 'death benefits,' 'former spouse annuity,' or similar terms will not be interpreted to award a former spouse annuity." AF, Tab 5. The agency stated that the law makes it quite clear that, even without magic words, there must be a manifest intent to provide an annuity in the subject provision of the court order. *Id.*

The appellant has not shown she is entitled to a former spouse survivor annuity

When a Federal employee elects to receive a reduced annuity at the time of retirement in order to provide a survivor annuity for his or her spouse, and the couple later divorces, the former spouse is entitled to retain a survivor annuity benefit "if and to the extent expressly provided for" in the terms of the decree of divorce or the court-approved property settlement agreement incident to such decree. 5 U.S.C. § 8341(h)(1).

The "expressly provided for" provision does not require "magic words," but only that the intent to provide the survivor annuity be clear, definite, explicit, plain, direct, and unmistakable, not dubious or ambiguous. *See Thomas,* 46 M.S.P.R. at 653-54. The interpretation

of what is expressly provided for in a court order or court- approved property settlement agreement incident to a decree of divorce must be made on a case-by-case basis. *See Hahn v. Office of Personnel Management,* 71 M.S.P.R. 154, 156 (1996).

I note that when the appellant and the retiree/annuitant were divorced, following his retirement, she was no longer entitled to the survivor annuity coverage that her former spouse had provided for her at the time of his retirement. *See Sandel v. Office of Personnel Management,* 28 F.3d 1184, 1186 (Fed. Cir. 1994). After her divorce her entitlement to a survivor annuity, for our purposes here, had to be based on her status as a former spouse, and then only to the extent expressly provided for in a court order or court approved property settlement incident to a decree of divorce. *Id.*

Neither the court nor the Board is permitted by the terms of 5 U.S.C. § 8341(h) to rewrite or equitably reform state court divorce decrees or settlement agreements that do not unambiguously provide for a CSRS annuity. *Fox v. Office of Personnel Management,* 100 F.3d 141, 145 (Fed. Cir. 1996). Both the Board and OPM are precluded from undertaking their own determination of spousal entitlements and awarding survivor benefits based on uncertain state court orders. *See Nicholson,* 64 M.S.P.R. at 342.

The Board has clearly articulated its view that a former spouse is not "expressly provided for" if ambiguous court order provisions can be interpreted to provide for more than one type of benefit. *Cf. Holzman v. Office of Personnel Management,* 62 M.S.P.R. 254, 259 (1994) ("pension benefits," standing alone, could

be construed as a portion of the employee annuity, a survivor annuity or a lump-sum payment) *aff'd,* 48 F.3d 1237 (Fed. Cir. 1995) (Table).

Here, the only language at issue in the appellant's property settlement agreement states:

"The parties hereby agree that the pension shall remain as is with any beneficiary entitlements to remain in Wifes name." AF, Tab 5, Subtab 6.

Even assuming that the pension referenced refers to CSRS, based on earlier language in the agreement addressing "a pension from the Federal Government," and that this satisfies the requirement that the court order contain language identifying the retirement system affected, the lack of any wording that "expressly state[s] that the former spouse is entitled to

a former spouse survivor annuity," or "terms that are sufficient to identify the survivor annuity," precludes the Board from providing the appellant the relief she seeks.

The appellant argues that the language of 5 C.F.R. § 838.912(b)(1), which states that a court order is acceptable if it provides that the former spouse is to "continue as" the beneficiary of CSRS survivor benefits, should be applied to the language quoted above from her property settlement agreement, and that if this was done her agreement would also be acceptable to the agency. What her argument overlooks, however, is the requirement that to qualify for entitlement to a survivor annuity the type of court order covered by § 838.912(b)(1) must use language similar to: "Continue as" or be "named as" *"the beneficiary of CSRS survivor benefits."* 5 C.F.R. § 838.912(b)(1) (emphasis added). Such was not the case in the

appellant's property settlement agreement.

The appellant' s rights in regard to the retiree/annuitant's pension were limited to *"any* beneficiary entitlements," that may have existed being retained in her name. AF, Tab 5, Subtab 6 (emphasis added). Without more, it appears that the agreement was ambiguous, and perhaps even speculative, in regard to what, if any, beneficiary entitlements the appellant may have had based on the property settlement. It is just as likely that the agreement was referring to the appellant's designation as a beneficiary for a lump-sum benefit that may have been payable under the CSRS as a result of the death of the retiree/annuitant. I note that a copy of an SF Form 2806-Designation of Beneficiary, naming the appellant and two children as beneficiaries for a lump-sum payment, is included in the agency's response file. AF,

In sum, I find the language quoted above from the appellant's property settlement agreement, "beneficiary entitlements," falls short of a satisfying the requirement that a former spouse survivor annuity, whatever its extent, be "expressly provided for" in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree. 5 U.S.C. § 8341(h)(1); *cf Thomas,* 46 M.S.P.R. at 654-55 (reference to "death benefits" alone, without more, could be construed as a survivor annuity or lump-sum payment).

Based on the above, I further find that the appellant, as found by OPM, has not shown that she is entitled to a survivor annuity as the former spouse of

Lucius A. Blount.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD:

Edward F. Manning
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on OCT 18 2002, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is

received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document was sent by regular mail this day to each of the following:

Appellant

M. Louise Blount
45252 Andy Way
California, MD 20619-3101

Appellant's Representative

Anthony J. Vetrano, Esq.
Vetrano & Vetrano
Suite 118
216 Mall Boulevard
King Of Prussia, PA 19406

Agency's Representative

John Zimmerman
Reconsideration and Appeals Branch
Retirement Appeals- Room 3468
Office of Retirement Programs
Post Office Box 664
Washington, DC 20044

Other

Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 E Street, NW, Room 7412
Washington, DC 20415

September 13, 2002
(Date)

Cynthia L. Boston
Legal Assistant

Docket No. DC-0831-02-0499-I-1

Party: Appellant's Representative

Anthony J. Vetrano, Esq.
Suite 118
216 Mall Boulevard
King Of Prussia, PA 19406

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

03-3144

M. LOUISE BLOUNT,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ON MOTION

Before NEWMAN, BRYSON, and DYK, Circuit Judges.

BRYSON, Circuit Judge.

ORDER

M. Louise Blount requests that the court accept her untimely petition for review.

On September 13, 2002, the Administrative Judge (AJ) issued an initial decision informing Blount that the AJ's decision would become a final Merit Systems Protection Board decision on October 18, 2002. The AJ's decision specified that any petition for review must be filed with this court within 60 days of the date the decision became final. Blount's petition for review was received by the court on December 18, 2002, 61 days after the AJ's decision became final.

Our review of a Board decision is governed by 5 U.S.C. § 7703(b)(1), which provides that "[n]otwithstanding any other provision of law, any petition for review must be filed within 60 days after the

date the petitioner received notice of the final order or decision of the Board." This filing period is "statutory, mandatory, [and] jurisdictional." Monzo v. Dept. of Transportation, Federal Aviation Administraiton, 735 F.2d 1335, 1336 (Fed. Cir. 1984). Thus, under the time provision of the statute, Blount's petition for review was due in this court within 60 days of the Board's final decision, i.e., December 17, 2002. Because it was received on December 18, 2002, one day late, this court must dismiss Blount's petition as untimely.*

Accordingly,

IT IS ORDERED THAT:

(1) Blount's petition for review is dismissed.

(2) Each side shall bear its own costs.

FOR THE COURT

MAY –1 2003
Date

William C. Bryson
Circuit Judge

cc: Anthony J. Vetrano, Esq.
David M. Cohen, Esq.

s17

ISSUED AS A MANDATE: MAY – 1 2003

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* Counsel for Blount states that he sent the petition for review using a private delivery service on December 16, 2002, and that the service acknowledges that the package should have been delivered on December 17, 2002. However, regardless of the circumstances that contributed to the late filing, the time limit for filing a petition for review is mandatory and cannot be waived. See Fed. R. App. P. 26(b)(2) (a court may not extend the time to file a petition for review unless authorized by law).

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

03-3144

M. LOUISE BLOUNT,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ON MOTION

Before NEWMAN, BRYSON, and DYK, Circuit Judges.

BRYSON, Circuit Judge.

ORDER

M. Louise Blount moves for reconsideration of the court's May 1, 2003 order dismissing her petition for review as untimely.

Blount's motion for reconsideration relies heavily upon the doctrine of equitable tolling and our decision in Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998). However, in this case it is clear that 5 U.S.C. § 7703(b)(1) is jurisdictional and therefore the doctrine of equitable tolling is not applicable.

Accordingly,

IT IS ORDERED THAT:

The motion is denied

FOR THE COURT

JUN 19 2003
Date

William C. Bryson
Circuit Judge

cc: Anthony J. Vetrano, Esq.
Joseph Trautwein, Esq.

s17

AIRBORNE EXPRESS

January 17, 2003

Vetrano & Vetrano
216 Mall Blvd. Ste 118
King of Prussia, PA 19406

Attn; Anthony Vetrano:

Please accept my sincere apologies for the delivery delay of shipment # 9286702493.

According to our records, we picked-up the above package on December 16th, 2002. The delivery expectation of December 17th, 2002, was not met, due to Airborne's error. Package was delivered on December 18th, 2002.

In the past, for several years Airborne Express has experienced extraordinary growth. We are currently making over 1.5 million deliveries daily. Our airport

expansion, additions to our staff and fleet have driven our service performance to record levels. Service to our customers is of the utmost importance to us and service failures of this type are not only troubling, but are taken very seriously. Quality and reliable service for our Customers is the most important aspect of our operations.

Again, please accept my apologies for this service failure. If I can be of further assistance in this matter, please do not hesitate to contact me at (800) 247-2676.

Thank you,

_____

Iris Allen
Customer Service
Administrative Assistant